

CHAPTER 14 – FIREARMS AND OTHER DEADLY WEAPONS

STATUTORY REFERENCES:

NH CONST. pt. I, Article 2-a
RSA 159:3 (Convicted Felons)
RSA 159:11 (False Information)
RSA 159-C:2 (Sale of Handguns:
Criminal Record Check)
RSA 159-D:3 (Penalty for Attempts
to Purchase Firearms
Illegally)
RSA 173-B:4 (Temporary Relief)
RSA 173-B:5 (Relief)
RSA 173-B:9 (Violation of
Protective Orders)
RSA 173-B:11 (Notice to Victims)
RSA 625:11, V(Deadly Weapons)
RSA 629:1 (Attempt)

INTRODUCTION

"All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." (NH CONST. pt. I, Art. 2-a)

"The state constitutional right to bear arms is not absolute and may be subject to restriction and regulation." State v. Smith, 132 NH 756 (1990).

In 2000, changes to RSA 173-B took effect which bring New Hampshire law into conformity with the Federal Gun Control Act of 1968, as amended (18 U.S.C. Section 922). Although there are references to firearms and other deadly weapons throughout the entire protocol, having one chapter devoted to firearms and other deadly weapons may be useful to judges and staff alike. This chapter will be divided into three sections: relinquishment, storage and return.

GENERAL DEFINITIONS

Firearms

"Firearm" is defined in RSA 173-B:1, XI as "any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by force of gun powder". Note that New Hampshire has no further definition of firearm.

COMMENT

For more specific definitions of firearms, particularly under federal law, one should refer to the definitions listed in the Gun Control Act of 1968. The New Hampshire definition is more inclusive than the federal. Judges should be aware that certain "guns" do not qualify as "firearms" under federal law. For example, muzzle loaders and certain antique firearms manufactured before 1898 are exempt from the provisions of the Gun Control Act as it pertains to domestic violence civil and criminal cases. They nevertheless qualify under state law as firearms. The Bureau of Alcohol, Tobacco and Firearms may be a reference if there are questions about any exemptions under the Gun Control Act. Questions may also be referred to Sgt. Patrick Poirier who manages the Gun Line at the Department of Safety. (Tel. (603) 271-3575)

Deadly Weapons

In addition to the relinquishment of firearms, RSA 173-B provides for the relinquishment of specified deadly weapons. For purposes of RSA 173-B, deadly weapons are defined as any "knife or other substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury" (See RSA 625:11, V). On the petition for a domestic violence order, the plaintiff is asked to identify any deadly weapons that he or she wants the defendant to surrender. In addition to the identified weapons, the court should review the allegations underlying the petition for mention of the use or threatened use of a deadly weapon. If the court determines that the defendant should be ordered to relinquish those weapons, it must specifically identify them in the protective order.

A. RELINQUISHMENT

Under state law, a court has the **discretion** to order a defendant to relinquish firearms and deadly weapons as part of a telephonic or temporary order. Relinquishment is **mandatory** at the time of a final order, and upon arrest for a violation of a civil protection order.

Under **federal** law {18 U.S.C. sec. 922 (g)(8)}, it is also a crime to possess a firearm or ammunition while subject to a valid protection order which restrains the defendant from harassing, stalking or threatening an intimate partner or child of an intimate partner. The order must have been issued after a hearing at which the defendant had actual notice and an opportunity to participate.

The order must also include a finding that the defendant represents a credible threat to the physical safety of the victim or must explicitly prohibit the use, attempted use or threatened use of physical force against the victim.

COMMENT

Law enforcement officers and military personnel are not subject to this law insofar as their service weapons are concerned. They may possess a firearm while on or off duty, as long as the officer's official duties require possession of the weapon. They may not otherwise possess personal firearms.

The federal gun restrictions apply where a victim is either a current or former spouse, person who has a child with the defendant, or person who has cohabited with the defendant.

1. Emergency Telephonic Orders

PROTOCOL 14-1

Relinquishment of firearms, ammunition and deadly weapons is discretionary with the court at the time of a telephonic emergency protection order issued during non-business hours. The court should always inquire of the law enforcement officer placing the call about the existence of firearms, ammunition and deadly weapons in the possession, ownership or control of the defendant, or any other person on behalf of the defendant, and give due consideration to the safety needs of the victim and children in deciding whether to order relinquishment. The law enforcement officer's input on the risks posed by the defendant should also be considered.

2. Notice to Victims

PROTOCOL 14-2

Court staff shall advise all victims, at the time of the request for a civil protection order, of their right to request that the court issue an order removing any and all firearms and ammunition in the control, ownership or possession of the defendant, or any other person on behalf of the defendant. Staff shall also advise plaintiffs that they may request the court to issue an order directing the defendant to temporarily relinquish any deadly weapons in the control, ownership or possession of the defendant, or any other person on behalf of the defendant.

3. Temporary Orders

PROTOCOL 14-3

The court must review the plaintiff's petition to determine if the plaintiff has requested that

firearms, ammunition and other deadly weapons be relinquished, and must also review the defendant's information sheet (which the plaintiff prepares) to determine if any such weapons are enumerated.

PROTOCOL 14-4

Relinquishment of firearms, ammunition and other deadly weapons at the time of a temporary hearing is discretionary. In deciding whether to order relinquishment, the court should give due consideration to the safety needs of the victim and children. If the law enforcement officer is present, his/her input on the risks posed by a defendant should also be considered.

COMMENT

RSA 173-B is a civil statute, designed to be prophylactic in nature, to prevent and protect a victim from abuse. The court should carefully consider and weigh the safety needs of the victim against any demonstrated need for a firearm by the defendant.

PROTOCOL 14-5

Relinquishment, if ordered, shall be to a peace officer. The defendant may be ordered to surrender any and all firearms and ammunition in the defendant's control, ownership or possession. The court may also order any other person holding a firearm or ammunition on behalf of the defendant to relinquish them to any peace officer.

PROTOCOL 14-6

The court may also order the defendant to relinquish any deadly weapons which were identified in the petition for a protective order, which are in the possession of the defendant or any other person on behalf of the defendant if any were specified in the petition. (RSA 173-B:4, I(a)(9))

PROTOCOL 14-7

The court may also prohibit the defendant from purchasing, receiving or possessing any deadly weapons and any firearms and ammunition for the duration of the order. (RSA 173-B:4, II)

COMMENT

RSA 159-D:3 makes the application for purchase of a firearm illegal if the person is subject to a protective order.

PROTOCOL 14-8

If a peace officer demonstrates probable cause to believe that a defendant has not relinquished firearms, ammunition or deadly weapons referenced in the protection order, the court may issue a search warrant authorizing the peace officer to seize any deadly weapons specified in

the protection order and any and all firearms and ammunition.

4. Final Orders

PROTOCOL 14-9

At the time of issuance of any final protection order, the court must include an order directing the defendant to relinquish to a peace officer any and all firearms and ammunition in the control, ownership or possession of the defendant, or any other person on behalf of the defendant, for the duration of the protection order. (RSA 173-B:5, I)

PROTOCOL 14-10

The defendant shall also be ordered to relinquish to a peace officer any and all deadly weapons specified in the protection order that are in the control, ownership or possession of the defendant, or any other person on behalf of the defendant. (RSA 173-B:5, I(a)(6))

PROTOCOL 14-11

The defendant shall be prohibited from purchasing, receiving or possessing any deadly weapons and any and all firearms and ammunition for the duration of the order. (RSA 173-B:5, II)

PROTOCOL 14-12

As may occur pursuant to a temporary order, if a peace officer demonstrates probable cause to believe that firearms and ammunition and specified deadly weapons have not been relinquished and are kept on the premises or curtilage of the defendant, the court may issue a search warrant authorizing the peace officer to seize such weapons, firearms and ammunition. (RSA 173-B:5, II)

5. Violations

PROTOCOL 14-13

Subsequent to an arrest for violation of any protection order (whether telephonic, temporary, final or foreign), a peace officer shall seize any firearms and ammunition in the control, ownership or possession of the defendant and any deadly weapons which have been used or were threatened to be used during the violation of the protective order. (RSA 173-B:9(b))

NOTE: Judges are reminded that any person subject to a protective order who completes and signs an application for purchase of a firearm and who knows that purchase is illegal shall be guilty of a misdemeanor for the first offense and a class B felony for any subsequent offense. (RSA 159-D:3)

Any person who, in purchasing or otherwise securing delivery of a pistol, revolver, or other firearm, gives false information or offers false evidence of his identity, shall be guilty of a misdemeanor for the first offense, and be guilty of a class B felony for

any subsequent offense.

PROTOCOL 14-14

The law enforcement agency shall maintain possession of the firearms, ammunition and deadly weapons until the court issues an order directing that they be relinquished and specifying the person to whom they will be relinquished.

B. STORAGE

Although the statute calls for a relinquishment of firearms to a peace officer, a defendant may make alternative arrangements with a federally licensed firearms dealer for the storage of firearms, at the defendant's expense. (RSA 173-B:5, X(c)) Any such alternative arrangements must be approved by the court in advance. The defendant must relinquish the guns to the appropriate law enforcement agency which will, in turn, transfer them to the storage facility. The defendant is not permitted to turn the firearms over to the storage facility directly. Note that the statute permits alternative arrangements for storage of firearms and ammunition, but is silent on the issue of alternative storage for other deadly weapons.

PROTOCOL 14-15

Any request for alternative arrangements must be presented to the court in the form of an oral or written motion. All parties shall be given the opportunity to be heard.

PROTOCOL 14-16

Firearms and ammunition may only be transferred to a federally licensed firearms dealer. If so approved by the court, the firearms shall be transferred directly from the appropriate law enforcement agency to the federally licensed firearms dealer. (RSA 173-B: 5, X(c).)

COMMENT

Friends, relatives or other third parties are not permitted to store firearms and ammunition during the term of the protection order.

PROTOCOL 14-17

Law enforcement agencies or other approved storage facilities are permitted to charge a fee for storage of firearms, ammunition and specified deadly weapons. The fee charged by a law enforcement agency may not exceed the actual cost of storage. Law enforcement agencies shall not be held liable for alleged damage or deterioration due to storage or transportation, so long as due care is used.

PROTOCOL 14-18

No law enforcement agency or federally licensed firearms dealer may release any firearm, ammunition or deadly weapons without a court order. (RSA 173-B:5, X (c)) A defendant is not permitted to retrieve guns being held in storage by a licensed firearms dealer directly through the dealer. Retrieval of the guns shall be through the law enforcement agency that turned the guns over to the storage facility and that agency will, in turn, release the firearms, ammunition or other deadly weapons upon court order.

PROTOCOL 14-19

Court security personnel shall run a criminal record check with the NH Gun Line prior to returning any firearms, or ammunition. If the owner of the firearms, or ammunition is denied return, security shall notify local law enforcement and the court.

C. RETURN OF FIREARMS, AMMUNITION AND OTHER DEADLY WEAPONS

When a civil protection order expires (which includes when an order is withdrawn by a plaintiff or dismissed by a court), a defendant may be entitled to the return of firearms, ammunition or other deadly weapons. There are certain important state and federal limitations on a defendant's right to return of firearms and ammunition. The procedures and restrictions are set forth below. These procedures apply to ALL returns of firearms, ammunition and other deadly weapons, whether relinquished or seized at the time of an emergency, temporary or final order, or following arrest for violation of a protection order, and whether the firearms are held by a law enforcement agency or a federally licensed firearms dealer.

1. Defendant's Request

PROTOCOL 14-20

Within 15 days prior to the expiration of a protection order, a defendant may request, by written motion, the return of any and all firearms and ammunition and specified deadly weapons held by the law enforcement agency while the protection order was in effect. (RSA 173-B:5, X(a))

COMMENT

This provision is not intended to create a deadline by which a defendant must file a motion for return. Rather, it establishes the earliest date on which such a motion may be filed. The defendant may file a motion for return at any time after that date, including after expiration of the order.

PROTOCOL 14-21

The defendant shall file a written motion and affidavit requesting the return of firearms and ammunition, and specified deadly weapons, using a form prepared by the court. The defendant shall attest to the fact that the defendant knows of no reason why he or she is not entitled to return of such weapons.

PROTOCOL 14-22

Upon receipt of the motion and affidavit, the court shall schedule a hearing no later than 15 days after the expiration of the order.

COMMENT

The statute presumes the defendant will file a request well in advance of the expiration of the order. However, if a defendant files the request immediately prior to or at any time following expiration of the order, the court should schedule a hearing **within 15 days** of receipt of the request, if possible, but **no later than 30 days** following the request.

PROTOCOL 14-23

The court shall provide written notice to the plaintiff and to the law enforcement agency which has possession of the firearms, ammunition and specified deadly weapons.

PROTOCOL 14-24

As soon as a hearing is scheduled and the court has provided the parties with notice, the court shall, at the same time, fax the defendant's motion and affidavit to the Department of Safety or local law enforcement agency to request that a search of the defendant's records be undertaken prior to the scheduled hearing.

- a. If the defendant is seeking return of firearms and ammunition, or firearms and ammunition and other deadly weapons, the request(s) shall be sent to the Department of Safety.
- b. If the defendant is seeking return ONLY of other deadly weapons, the request shall be transmitted to the law enforcement agency which is in possession of the deadly weapons.
- c. The Department of Safety or the local law enforcement agency will thereafter conduct the appropriate search and file a notice with the court indicating whether there is cause or no cause to deny the return.

PROTOCOL 14-25

The court shall not conduct a hearing until it has received a written response from the

Department of Safety or appropriate law enforcement agency.

COMMENT

Although courts should send requests for records searches to the Department of Safety or local law enforcement agency upon receipt of a defendant's motion and affidavit, it is useful for the check to be completed **immediately prior** to the scheduled hearing to ensure that the court has current information. It is important, however, to allow sufficient time to process these requests. Thus, requests should be forwarded **immediately** upon receipt from the defendant, but the court should not expect to receive the return information until **immediately prior** to the scheduled hearing.

2. Scope of Hearing

PROTOCOL 14-26

The court must conduct a hearing if the defendant wishes to have firearms and ammunition and/or other deadly weapons returned. The scope of the hearing, pursuant to RSA 173-B:5, X, shall be limited to:

- a. Determining whether the defendant is subject to any state or federal law or court order that precludes the defendant from owning or possessing a firearm or ammunition; and
- b. Where the plaintiff has requested an extension of the protection order, whether the plaintiff has established by preponderance of the evidence that the defendant continues to represent a credible threat to the safety of the plaintiff.

COMMENT

Although the statute does not specifically address the scope of the hearing as it would pertain to other deadly weapons, presumably the inquiry would relate to whether there is any statutory or other prohibition (including court rule) against their possession.

3. Grounds for Denial of Return of Firearms and Ammunition

In general, if a defendant is subject to a valid protection order issued by any other court, or has ever been convicted of a **qualifying misdemeanor crime of domestic violence**, or the defendant's possession of the firearm is otherwise prohibited by law, the defendant will not be entitled to return of the firearms and ammunition. See the discussion under Part A: Relinquishment, for restrictions pertaining to civil protection orders.

PROTOCOL 14-27

Federal law [18 USC sec. 922 (g)(9)] prohibits defendants who have been convicted of a

qualifying misdemeanor crime of domestic violence from ever possessing a firearm. Although the statute was passed in 1996, it applies to convictions before and after the effective date.

A **qualifying misdemeanor crime of domestic violence** is one which has, as an element, the use or attempted use of physical force, or the use of a deadly weapon, and is committed by:

- a. A current or former spouse, parent or guardian of the victim;
- b. A person with whom the victim shares a child in common;
- c. One who is or has cohabited with the victim as a spouse, parent or guardian; or
- d. Someone "similarly situated" to a spouse, parent or guardian of the victim.
- e. The defendant must have had or waived counsel, and if waived the waiver be knowing and voluntary, and had or waived jury trial (if entitled by law to a jury trial). There must be a showing that the guilty plea was voluntary, and that the defendant knowingly waived his rights pursuant to entry of the plea.

NOTE: If the defendant is charged with a Class A Misdemeanor, has or waives counsel, and had or waived jury trial, and the sentence upon conviction is recorded as a B Misdemeanor (because no jail time was included), the conviction is still a qualifying misdemeanor crime of domestic violence according to the United States Department of Justice and the defendant is forever prevented from possessing a firearm.

NOTE: Law enforcement officers and military personnel are not exempt from this statute. Any law enforcement officer or member of the military who has, at any time, been convicted of a qualifying misdemeanor crime of domestic violence may no longer possess a firearm for any purpose, including the performance of official duties.

PROTOCOL 14-28

Where a defendant has surrendered firearms at the time of a final protection order hearing, he or she may request return of the firearms when the protection order expires. It is the court's responsibility to initiate a search at the Department of Safety to determine if the defendant is subject to any other protection order, or has ever been convicted of a qualifying misdemeanor crime of domestic violence. Unless answers to both questions are in the negative, the firearm may not be returned. Any court that authorizes return under these circumstances, knowing that the defendant is a prohibited person, may be violating federal law. The penalties are substantial. The following should be carefully reviewed prior to acting on a request to return firearms or ammunition.

NOTE: In determining whether there is cause to deny a defendant's request for return of firearms, the Department of Safety will review the defendant's record for any indication about whether the defendant is subject to any of the federal or state prohibitions listed below.

a. Federal Prohibitions

PROTOCOL 14-29

A person who falls within any of the following categories is prohibited from possessing firearms and ammunition under federal law:

- (i) Persons subject to either an outstanding final domestic violence protection order or a temporary order which requires relinquishment of firearms, and the order was issued against the defendant in New Hampshire or elsewhere in the country (including all states, territories, tribal courts and possessions);
- (ii) Persons who have been convicted of any qualifying misdemeanor crime of domestic violence, regardless of where the conviction occurred;

COMMENT

If a defendant's conviction is annulled, it shall no longer be considered a qualifying misdemeanor crime of domestic violence.

- (iii) Persons who are aliens and have illegally or unlawfully entered the United States;
- (iv) Persons who are not United States citizens;
- (v) Persons who have been adjudicated as a mental defective or have been committed to a mental institution;
- (vi) Persons who have been dishonorably discharged from the military;
- (vii) Persons who are unlawful users of or are addicted to any controlled substance;
- (viii) Persons who have been convicted of a felony under state or federal law (that is, convicted of an offense punishable by imprisonment of more than one year); or
- (ix) Persons who are under indictment or information for a felony.

COMMENT

Except for subparagraphs (i) and (ix) above, any of the remaining categories constitute permanent restrictions against possession of firearms.

PROTOCOL 14-30

Two additional provisions of the Gun Control Act, 18 USC sec. 922(d)(8) and (d)(9), make it a crime to knowingly transfer (or sell) a firearm or ammunition to any person who is disabled from possessing a firearm or ammunition.

b. State Prohibitions

PROTOCOL 14-31

If a defendant is currently on probation or parole, or is subject to a bail order prohibiting possession, the firearms and ammunition shall not be returned. See Superior Court Rule 107(f) and District Court Rule 2.17 (f).

4. Grounds for Denial of Deadly Weapons

PROTOCOL 14-32

If the defendant is requesting return of specified deadly weapons only, the court must determine whether the defendant is a convicted felon and, if so, whether the defendant is barred from owning or possessing the weapons under RSA 159:3.

COMMENT

RSA 159:3 prohibits certain felons from owning or possessing dangerous weapons such as metallic knuckles, swords, pistol canes, daggers, stilettos, etc.

NOTE: There is no federal law concerning return of deadly weapons.

5. Conduct of Hearing

PROTOCOL 14-33

The court shall conduct a hearing on the defendant's request for return of firearms, ammunition and other deadly weapons.

PROTOCOL 14-34

The defendant shall be given an opportunity to address the court on the request. The defendant shall be placed under oath and asked if there have been any further arrests, bail orders, indictments, protection orders or any other new information since the filing of the motion and affidavit. If any new information is presented by the defendant, since the date of receipt of the Department of Safety or local law enforcement agency report, the hearing shall be suspended to provide the Department of Safety or local law enforcement agency with an opportunity to verify the information.

PROTOCOL 14-35

The law enforcement agency shall be given an opportunity to be heard, but shall not be required to attend.

PROTOCOL 14-36

The plaintiff shall also be given the opportunity to be heard, but shall not be required to attend unless the plaintiff has requested an extension of the protection order. If so, the court will consider whether the plaintiff has established, by preponderance of evidence, that the defendant continues to present a credible threat to the plaintiff's safety. If the order is extended, the request for return shall be denied. If the plaintiff has not filed for an extension of a protection order and does not wish to do so, there will be no legal basis to withhold the return of a firearm, even if the plaintiff states or appears to be in fear of the defendant, provided that none of the other criteria specified in these protocols exists.

PROTOCOL 14-37

If the court finds that the defendant is not subject to any state or federal law, court rule or court order precluding ownership or possession of firearms, ammunition or other deadly weapons, the court shall issue a written order directing the law enforcement agency to return the requested firearms, ammunition or other deadly weapons to the defendant.

PROTOCOL 14-38

If the search reveals that there are other civil protection orders issued by a different court, involving the same or a different plaintiff, return of the weapons shall be denied. The defendant will be required to file a motion in such other case as may be appropriate.

PROTOCOL 14-39

If the basis for denial of the return of a firearm is any grounds set forth above, the defendant will be advised that he or she may no longer purchase, own or possess a firearm or ammunition. These prohibitions are lifetime, permanent restrictions. The only exception is if the convictions are expunged or annulled.

PROTOCOL 14-40

If the return is denied, it will be up to the defendant and law enforcement agency to determine alternative disposition of the firearms, ammunition and other deadly weapons, subject to court approval.

- a. If the disposition of a firearm or ammunition or other deadly weapon is to a federally licensed firearms dealer, the parties may file a stipulation for approval by the court.

- b. If the disposal is to any private party, the Court must determine if the new applicant is legally barred from possessing firearms, ammunition or other deadly weapons. The applicant shall be required to complete a motion as set forth in Protocols 180 et. seq. above, following which a hearing shall be scheduled.

For further information regarding enforcement of NH laws on firearms, ammunition and deadly weapons possession, sale, purchase or transfer, see State of New Hampshire Department of Justice: Enforcement Memorandum on New Hampshire Laws Outlawing the Purchase or Attempted Purchase of Weapons by Prohibited Persons, October 30, 2000.